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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
V.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL.,
Respondents.

SEATTLE-FIRST NATIONAL BANK,
Petitioner,
V.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE LEGAL FOUNDATION OF AMERICA

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston and shares certain personnel and activities with the law school. Its goals, among others, include the preservation of the market system of resource allocation, the attainment of a better balance between the federal government and the States, and the furtherance of individual political and economic liberties. In pursuit

of its purpose to enhance the function of the market system, LFA has frequently appeared as amicus curiae in cases involving labor issues both in this Court and in lower courts. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, businesspeople and academics.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals failed to follow the prior decisions of this Court requiring deference to decisions of the National Labor Relations Board in applying the NLRA, by substituting its own judgment for that of the Board.

The Ninth Circuit's decision further fails to follow the statutory requirement that the bargaining representative be selected by *all* employees, by allowing an affiliation decision to be made on the basis of a vote of union members only, which may well be a *minority* of all employees. The non-union member has no voice in the selection and has no really satisfactory way to challenge the selection after it has occurred. The approach approved by the Ninth Circuit thus leads to labor unrest and divisiveness, which is the antithesis of one of the primary purposes of the NLRA—the promotion and preservation of labor peace.

ARGUMENT

I. THE COURT OF APPEALS FAILED TO FOLLOW THE PRIOR DECISIONS OF THIS COURT.

The prior decisions of this Court, which are reflected in the decision of the Fifth Circuit in *Local Union No. 4-14 v. NLRB*, 721 F.2d 150 (5th Cir. 1983),[1] establish the rule of deference to

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1 The Fifth Circuit found the NLRB rule to be within "the wide discretion of the Board to establish procedures in an affiliation election that will ensure the fair and free choice of the bargaining representative of all the employees." 721 F.2d at 153.

Board interpretations of the NLRA. [2] This rule is followed unless the Board's interpretation is irrational or inconsistent with the Act. [3] The decision of the court below fails to give such deference. [4]

II. THE DECISION BELOW IS INCONSISTENT WITH BOTH THE EXPRESS PROVISIONS AND THE OVERALL PURPOSE OF THE NATIONAL LABOR RELATIONS ACT.

The NLRA provides that the union is to represent all employees, whether members or not. [5] All employees surrender

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2 This Court emphasized this just last year in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S.Ct. 2778 (1984), when it stated:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.

Id. at 2782 (footnote omitted).

3 This Court has consistently upheld Board decisions when the Board is not "irrational or arbitrary" and does not "exceed its powers or venture into an area barred by the statute," NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963), making it clear that the "judicial role is narrow" in such cases. Beth Israel Hospital v. NLRB, 437 U.S. 483, 501 (1978).

4 The Ninth Circuit compared the prior NLRB rule with the new rule and decided that the earlier rule was adequate, making it "irrational" to adopt the new rule. Financial Institute Employees, Local No. 1182 v. NLRB, 738 F.2d 1483, 1492-1493 (9th Cir. 1984). In doing so, the court substituted its judgment for that of the NLRB.

5 Section 7 provides that employees "shall have the right . . . to bargain collectively through representatives of their own choosing . . ." 29 U.S.C. sec. 157 (1973). Section 9(a) provides that these representatives which are "designated or selected . . . by the majority of the employees . . . shall be the exclusive representatives of all the employees . . ." 29 U.S.C. sec. 159(a) (1973).

their individual bargaining rights to this exclusive bargaining representative. For this reason, the NLRA also provides that the exclusive bargaining representative is to be chosen by all employees.[6] The decision of the court below would defeat this purpose by disenfranchising non-union employees when the representative changes.[7]

A. The decision below allows the certification of a union that is not acceptable to a majority of employees.

The decision below enables unions to obtain certification of bargaining representatives that could not otherwise be elected, by initially electing a representative acceptable to the majority of employees and then affiliating on the basis of a minority vote, restricted to union members only. Although the Board may prevent this result in its certification decision,[8] such situations have occurred[9] and, under the approach approved by the lower court, are likely to occur in the future. For example, in *North Electric Company*, 165 N.L.R.B. 942, 943 (1967), the NLRB actually certified a representative, after a union-only election, that all employees had rejected by majority vote just fifteen months earlier.

This "minority rule" effect can also be seen in the vote in the instant case. As the dissent points out, with only union members participating in the vote, the affiliation decision was made on the basis of an affirmative vote of 1206 member employees out of a bargaining unit of about 4800 employees, or

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6 Id.

7 738 F.2d at 1493.

8 In Bedford Gear & Machine Products, Inc., 150 N.L.R.B. 1 (1964), the Board denied such a motion, stating that "granting such a motion in circumstances such as this would in effect result in the certification of the very union which less than a year before had been rejected by a majority of the employees." Id. at 2.

9 See North Electric Company, 165 N.L.R.B. 942 (1967).

about 25% of the unit. Since only the 2824 union members were given the opportunity to vote, and 774 of those voted against the affiliation,[10] the result could have been significantly different if all employees had been given the opportunity to participate in choosing the exclusive agent that would bargain for all of them.

The disadvantages of such "minority rule" are significant. First, it increases the probability of jurisdictional warfare between unions, with employees and firms caught in the middle. Thus the dissent in *North Electric Company, supra*, warns that "the amendment process may in the future be utilized to facilitate raiding between unions."[11] Secondly, the decision means that a few opinion leaders within the union can decide the result, and it thus increases the incentive to use improper means of persuasion, including special inducements to those individuals by a raiding union. Finally, the decision enhances the likelihood that employees may be forced to be represented by a deeply unacceptable union—one that is corrupt, for example, or one that will represent some groups at the expense of others. These concerns would be reduced by proper following of the requirement of the NLRA that all employees have the right to vote in the selection of the bargaining representative. They are not at all remedied by the continuity determination which the lower court approves.[12] At the very least, these concerns demonstrate a rea-

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10 738 F.2d at 1495.

11 165 N.L.R.B. at 944.

12 The court mentions several factors which may be considered in the continuity determination. Id. at 1488. However, if the Board decides which factors to consider, and what weight to be given to those factors, the right of the employee to select a bargaining representative based on the factors he considers most important is seriously diluted. This Court has said of the selection of a bargaining representative that "Congress attached no conditions whatsoever to their [the employees'] freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide." Hill v. Florida ex rel. Watson, 325 U.S. 538, 541 (1945).

sonable basis for the Board's approach, which is all that is required. [13]

The lower court's opinion leaves the non-union employee, who wishes to exercise his right to have a voice in the choice of his representative, without viable options. He could join the union in order to vote, but the Act guarantees each employee the right to refrain from union activity. [14] This right should not have to be relinquished in order to exercise another right protected under the Act: the right to select one's own bargaining representative. [15] Further, if this right can only be exercised by joining the union, the result is to pressure employees to join the union, and this result violates the Act's position of neutrality. [16]

Likewise, provisions for decertification do not provide a viable option in most cases. An after-the-fact procedure can in no way replace the right to participate in the initial election, and because of the presumptions and other difficulties built into the decertification process, [17] an employee who does not agree with

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13 Beth Israel, 437 U.S. at 501.

14 29 U.S.C. sec. 157 (1973).

15 Id.

16 In NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973), this Court found a waiver of initiation fees to all employees who signed union authorization cards prior to a certification election to be an impermissible influence in favor of unionization. As the Court said in that case:

> Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice.

Id. at 278.

17 The Ninth Circuit describes these procedures to illustrate the policy of preserving stability in the bargaining structure. 738 F.2d at 1491-1492. However, that discussion by the Court also illustrates the difficulties faced by a non-member who wants some input regarding the bargaining representative. The court describes the

a Board determination of continuity and is not satisfied that the new bargaining representative is indeed the choice of the majority of the unit faces a heavy burden in protecting his rights.

B. The decision below interferes more with industrial peace than does the NLRB rule which it rejects.

If the majority of employees are deeply dissatisfied with the choice of representative, the lower court rule provides them no alternative but to seek decertification. Such an effort, whether successful or not, will be divisive, will create animosities, and will foster the very perceptions of unfairness that the democratic processes of the Act are designed to avoid. Although the court below stated that its approach would promote "labor peace,"[18] that approach actually interferes with that goal.

The lower court's approach also interferes with labor peace to the extent that it facilitates "raiding" between unions. Union members will likely be subjected to more frequent and more intense pressures to affiliate with other unions, "a result which could only increase industrial strife."[19]

Further, as Petitioner Seattle-First National Bank has pointed out, the disruption in the instant case occurred because of the union's refusal to follow Board sanctioned procedures in effect at the time. If those procedures had been followed, and if the employees had in fact voted for a new representative, a transition could have occurred smoothly. Thus the only situations in which the Board's rule is likely to be disruptive are those

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presumptions of majority status that a certified union enjoys, the fact that decertification will not even be considered by the Board without a petition of 30% of the employees of the unit, or a showing of "extreme" circumstances, and the contract-bar rule, which allows no decertification elections during the life of the contract. Id.

18 738 F.2d at 1491.

19 North Electric Company, 165 N.L.R.B. at 944.

in which the union refuses to follow the rule or in which there is real doubt as to the acceptability to the majority of the union which is being proposed. The Board's rule simply includes all employees in an election that must be held in any event and that would otherwise differ only in its underinclusiveness; thus the Board's rule not only protects the rights of all employees, but does so with no significant increase in effort or expense.[20]

The court below suggests that the new rule is disruptive because under it "an affiliation decision will always call a union's continuing majority status into question."[21] There can be no "*continuing* majority status," however, when the bargaining representative changes. In any event, the Board rather than the Ninth Circuit is the body with expertise to resolve questions that thus require interpretation of policies underlying the Act.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

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20 The court below characterized the affiliation decision (erroneously, it is submitted) as merely "an internal union affair." The policy of noninterference with internal union affairs is not challenged here. Since an affiliation decision involves the very identity of the bargaining representative, it cannot be an "internal" decision, but must recognize the statutory right of all employees to participate. At a minimum, the question requires judicial deference to the Board's expertise.

21 738 F.2d at 1486.

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